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No. 83-486

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EDDIE THOMPSON, JR.,

Petitioner-Appellant-Plaintiff,

vs.

BERNARD MOORMAN,
KENTON COUNTY BOARD OF ELECTION,
A. T. WOOD,

Respondents-Appellee-Defendants.

RESPONDENT'S REPLY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JOHN R. ELFERS
Kenton County Attorney
304 City-County Building
Covington, Kentucky 41011
(606) 491-4114

MARTIN J. HUELSMANN
[Counsel of Record]
Assistant Kenton County Attorney
304 City-County Building
Covington, Kentucky 41011
(606) 491-4114

COURT INDEX PRESS, INC. — 315 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court and Sixth Circuit Court of Appeals error in dismissing this case under the Abstention Doctrine?

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATUTORY AUTHORITIES

42 U.S.C. 1983 – Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

SUPREME COURT RULES

Sup. Ct. Rule 17 (1) — A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup. Ct. Rule 34 (6) — Briefs must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court.

KENTUCKY REVISED STATUTES

120.155. Contest of regular election of officers other than governor, lieutenant governor, general assembly member and certain city officers. — Any candidate for election to any state, county, district or city office (except the office of governor, lieutenant governor, member of the general assembly, and those city offices as to which there are other provisions made by law for determining contest elections), for whom a number of votes was cast equal to not less than twenty-five per cent (25%) of the number of votes cast for the successful candidate for the office, may contest the election of the successful candidate, by filing a petition in the circuit court of the county where the contestee resides, unless the officer is one elected by the voters of the whole state, in which case the petition shall be filed in the Franklin Circuit Court. The petition shall be filed and process issued within thirty (30) days after the day of election; it shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon. The contestee shall file an answer within twenty (20) days after the service of summons upon him. The answer may consist of a denial of the averments of the petition and may also set up grounds of contest against the contestant; if grounds are so set up they shall be specifically pointed out and none other shall thereafter be relied upon by the party. Any candidate who would have been qualified to bring a contest action under this section, who is a party to a recount proceeding under KRS 120.185, may, by filing answer in the recount proceeding within the time allowed by the petitioner in the recount proceedings. A reply may be filed within ten (10) days after the answer is filed; its affirmative allegations shall be treated as controverted, and no subsequent pleading shall be allowed.

COUNTERSTATEMENT OF THE CASE

The petitioner brought this action against the respondents on November 13, 1979, charging the defendants with conspiracy under 42 U.S.C. 1983. Looking behind the words in the Complaint, it was merely an election contest case in which Thompson sought the aid of the Federal Court by allegations of conspiracy and race-motivated activities.

On the same date that Thompson filed the above suit in the Eastern District of Kentucky number 79-115, Thompson filed an identical suit in Kenton County Circuit Court numbered 79-CI-1776.

On August 4, 1981, the Appellees filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12 (b) (1) and (6). The Motion gave notice to the Plaintiff with the fact that the Motion was to be heard at the convenience of the Court. On August 6, 1981 Judge David S. Porter, Sr., United States District Judge, sitting by designation for Hon. William O. Bertelsman, granted the Motion. On August 19, 1981 the Judgment was entered pursuant to the Order of August 6, 1981. On September 21, 1981 Judge Porter denied a Motion by the Defendants for attorney fees.

On April 20, 1983 the Judgment of the District Court was Affirmed by the United States Court of Appeals for the Sixth Circuit although the docket entry was amended to reflect dismissal without prejudice.

On April 28 ,1983 Thompson filed a Petition for Rehearing and a suggestion for rehearing en banc. The Motion for rehearing was denied on July 25, 1983.

ARGUMENT

The Respondent must first assert that the Petitioner has subjected the Respondent to a frivolous appeal by including in this petition burdensome, irrelevant, immaterial, and scandalous matter in an attempt to cloud the issue of this case. Respondent therefore relies on Sup. Ct. Rule 34.6 and requests that this Petition be disregarded and stricken by the Court. Once again the Petitioner has introduced new items in the Petition for Writ of Certiorari.

In the brief for Appellant at page 4 the second last paragraph the Petitioner states:

> That raises the question of whether one (Petitioner) can be legally prosecuted for an alleged criminal trespassing at one's (Petitioner) own home (after the statutory time for prosecuting the alleged criminal trespass) to aid one's (Petitioner's) opponent in a municipal election, because of one's (Petitioner's) color, creed, race, religion, or sex, etc.

The Petitioner in this case has been to this court at least twice before. In 81-2178 the Petitioner had sued the same Mr. A. T. Wood for recording the deed to his former home. He apparently also was before this court in Case No. 82-2122 concerning the Criminal Trespass charges (Petitioner's brief page 5).

It is readily apparent that Mr. Thompson seeks to litigate and relitigate and relitigate on a pro-se basis.

Once again, the Petitioner sought to muddy up the waters by presenting the questions for the Court. The only question for the Court is did the District Court and Court of Appeals err in holding that this case should be dismissed under the Abstention Doctrine?

The Petitioner on November 13, 1983 filed two law

suits. The Petitioner filed both of these law suits pro se and the Court of Appeals stated:

> Moreover, there is no doubt in this case regarding the Appellant's willingness to litigate issues in State Court. Thompson filed BOTH petitions himself. (emphasis by the Sixth Circuit) (p. 5)

In both cases the petitioner stated in the Complaint the following:

> "25. That Plaintiff intends to have this Complaint filed in Kenton Circuit Court."

The Petitioner filed the Complaint in Federal Court solely for the purpose of asserting jurisdiction of the claim that is properly before the State Courts. See *Graf* v. *Barker,* 409 F. Supp. 571 (D.C., Wis., 1976). See generally Wright and Miller *Federal Practice and Procedure* § 1350 (1978).

The Complaint stated jurisdiction of the Federal Court pursuant to KRS 120.155 which clearly places jurisdiction in the Circuit Court of the County in which the contestee resides. Furthermore, it appears that the petitioner does not challenge the fact that State Courts have jurisdiction of the 1983 actions nor does he even mention in his brief that he filed a case in Kenton Circuit Court. Clearly states do have concurrent jurisdiction of 1983 actions. *Miever* v. *New York City Transit Authority,* 397 N.Y.S.2d 531 (1977), *Board of Education of Bellevue* v. *Rothfuss,* Ky., 639 S.W.2d 545 (1982).

The trial judge found the Motion to be well taken on two grounds. First, the Kentucky Revised Statutes chapter 116-121 set up a preliminary system of regulation of state, county and municipal elections. Thus the Court should abstain from exercising subject matter jurisdiction citing

Burford v. *Sun Oil Co.*, 310 U.S. 315 (1943); see Wright, Miller and Cooper, *Federal Practice and Procedure* § 4244 (1978).

The Court though went on to find the second reason in that the action is repetitive of the action filed in State Court and because the State Court was the more appropriate forum the policies of affording duplicative litigation, avoiding friction between State and Federal Courts, and promoting efficient use of judicial resources weighed against the exercise of this Courts subject matter jurisdiction in the action. The Court stated *Colorado River Water Conservation District* v. *United States*, 425 U.S. 800 (1976); *Will* v. *Calvert Fire Insurance Co.*, 427 U.S. 655 (1977) and other authorities.

The Sixth Circuit affirmed the dismissal on the basis of *Colorado River Conservation District* v. *United States* on the basis that it "(w)ise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation" required abstention. This doctrine has been applied when there have been clear parallel actions filed in State and Federal Court. *Levy* v. *Lewis*, 635 F.2d 960 (2nd Cir. 1980).

The Sixth Circuit reviewed the recent case of *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, —— U.S. ——, 103 S. Ct. 927, (1983). They noted that under *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.* the decision as to whether to dismiss a federal action should rest on a careful case-by-case balancing of the important factors as they apply in a given case. The Sixth Circuit found that the mitigating factors included:

1. The clear federal policy of avoidance of peace adjudication of water rights and river system.

2. The absence of any substantial progress in the federal court litigation.

3. The presence in the suit of extensive rights governed by state law.

4. The geographic inconvenience of the federal form.

5. The governments previous willingness to litigate similar suits in state courts.

The Sixth Circuit specifically found that the present case is more analagous to *Colorado River* than to *Mercury Construction Corporation*. The Court stated:

> There are no strong federal policies including no federal rules of decision which would control the resolution of a state election of law complaints in this case. In addition, there is no indication that the state proceedings will inadequately protect the appellant's interests under state law. On the other hand, there has been no substantial progress in the federal litigation, the rights governed by state election law lay at the heart of these complaints and there is a clear danger of peacemeal litigation on the exact same issues should the two cases proceed. Moreover, there is no doubt in this case regarding the appellant's willingness to litigate issues in state court. Thompson filed *both* petitions himself. (emphasis by court page 5.)

The Sixth Circuit went on to show that the dismissal with prejudice was to be changed to without prejudice in view of the fact that if the plaintiff had later demonstrated an inadequacy of the state form the federal courts would again be open. Clearly, the Court of Appeals was correct in their decision.

CONCLUSION

It is respectfully submitted that both the lower courts were correct in their decisions.

The Petition for Writ of Certiorari should be denied since it does not meet any of the tests under Supp. Ct. Rule 17 (1).

Respectfully submitted,

JOHN L. ELFERS
Kenton County Attorney
304 City-County Building
Covington, Kentucky 41011

MARTIN J. HUELSMANN
Assistant Kenton County Attorney
304 City-County Building
Covington, Kentucky 41011